Supreme Court, U.S.
FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF FOR PETITIONER

STEPHEN B. BRIGHT
PALMER SINGLETON*
ROBERT L. MCGLASSON
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

WILLIAM M. WARNER
507 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-5686

Counsel for Petitioner
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Where a prosecutor secretly directs jury commissioners to underrepresent black people and women on the grand and petit jury pools, and deliberately obscures *prima facie* evidence of the discrimination for the purpose of avoiding detection and judicial review, is a federal court barred from considering the merits of a post-conviction claim due to trial counsel's unknowing failure to object to the pools before indictment and trial as required by state law?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
CITATION TO OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
A. The Discriminatory Scheme And Its Concealment 3
B. Discovery Of The Scheme 6
C. Presentation Of The Claim To The State Courts .. 9
D. Findings And Decision Of The District Court 10
E. Decision Of The Court Of Appeals 13
SUMMARY OF ARGUMENT 15
ARGUMENT 17
PETITIONER AMADEO IS NOT BARRED FROM VINDICATION OF HIS CONSTITUTIONAL RIGHTS WHERE THE FACTUAL BASIS FOR HIS CLAIM WAS CONCEALED BY THE PROSECUTION FOR THE PURPOSE OF PREVENTING JUDICIAL REVIEW 17
A. THE PROSECUTION'S DELIBERATE CONCEALMENT OF ITS DISCRIMINATION CONSTITUTED CAUSE FOR MR. AMADEO'S FAILURE TO CHALLENGE THE JURY PRIOR TO TRIAL 21
1. Until The Inadvertent Discovery Of The Prosecutor's Memorandum, The Deliberate Discrimination In The Selection Of The Jurors Could Not Have Been Challenged 22
2. The District Attorney's Scheme Constituted An External Factor And Interference By Governmental Officials Which Prevented Mr. Amadeo's Counsel From Complying With The State's Procedural Requirement 25
B. THE COURT OF APPEALS' DECISION THAT THERE WAS NO CAUSE RESTS UPON ITS ERRONEOUS REJECTION OF FINDINGS OF FACT BY THE DISTRICT COURT THAT ARE NOT CLEARLY ERRONEOUS 28
C. NO LEGITIMATE STATE OR FEDERAL INTEREST WOULD BE SERVED BY BARRING A CLAIM WHERE THE PROCEDURAL DEFAULT WAS THE RESULT OF DELIBERATE CONCEALMENT BY THE STATE FOR THE PURPOSE OF PREVENTING JUDICIAL REVIEW 35
CONCLUSION 40

TABLE OF AUTHORITIES

Cases — Page

Adams v. *Wainwright*, 764 F.2d 1356 (11th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986) 29
Alexander v. *Louisiana*, 405 U.S. 625 (1972) 5
Amadeo v. *Kemp*, 816 F.2d 1502 (11th Cir. 1987) .... *passim*
Amadeo v. *Kemp*, 773 F.2d 1141 (11th Cir. 1985) ... 1, 12, 20
Amadeo v. *State*, 243 Ga. 627, 255 S.E.2d 718 (1979), *cert. denied*, 444 U.S. 974 (1979) 1, 3, 10, 18
Anderson v. *Bessemer City*, 470 U.S. 564 (1985) 16, 29, 30, 32, 33
Bailey v. *Vining*, Civil Action No. 76-199 MAC (M.D. Ga. 1978) ..... *passim*
Ballard v. *United States*, 329 U.S. 187 (1946) 39
Berger v. *United States*, 295 U.S. 78 (1935) 24
Blevins v. *State*, 220 Ga. 720, 141 S.E.2d 426 (1965) 23
Burns v. *State*, 172 Ga. App. 645, 324 S.E.2d 197 (1984) 24
Carter v. *Texas*, 177 U.S. 442 (1900) 19
Clark v. *State*, 255 Ga. 370, 338 S.E.2d 269 (1986) 23
County Court of Ulster County v. *Allen*, 442 U.S. 140 (1979) 19
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 38
Engle v. *Isaac*, 456 U.S. 107 (1982) ..... *passim*
Fay v. *Noia*, 372 U.S. 391 (1963) 35
Francis v. *Henderson*, 425 U.S. 536 (1976) 3, 11, 19, 36
Franks v. *Delaware*, 438 U.S. 154 (1978) 37
Freeman v. *Georgia*, 599 F.2d 65 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) 28, 33
Giglio v. *United States*, 405 U.S. 150 (1972) 37, 38
Hall v. *State*, 180 Ga.App. 881, 305 S.E.2d 801 (1986) ... 24
Henry v. *Mississippi*, 379 U.S. 443 (1965) 19
Hill v. *Texas*, 316 U.S. 400 (1942) 35
Kuhlman v. *Wilson*, 477 U.S. ___, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) 35
Miller v. *Pate*, 386 U.S. 1 (1967) 37, 38
Mooney v. *Holohan*, 294 U.S. 103 (1935) 38
Murray v. *Carrier*, 477 U.S. ___, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) ..... *passim*
Napue v. *Illinois*, 360 U.S. 264 (1959) 37
Neal v. *Delaware*, 103 U.S. 370 (1881) 35
Oregon v. *Kennedy*, 456 U.S. 667 (1982) 37
Peters v. *Kiff*, 407 U.S. 493 (1972) 35, 39

Table of Authorities Continued

	Page
Preston v. *Mandeville*, 428 F.2d 1392 (5th Cir. 1970) ...	5
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982).	17, 29, 34
Reece v. *Georgia*, 350 U.S. 85 (1955).	19
Reed v. *Ross*, 468 U.S. 1 (1984).	*passim*
Rogers v. *Alabama*, 192 U.S. 226 (1904)	19
Rogers v. *Lodge*, 458 U.S. 613 (1982).	16, 29
Rose v. *Mitchell*, 443 U.S. 545 (1979).	18, 39
Sanders v. *State*, 235 Ga. 425, 219 S.E.2d 768 (1975) ...	18
Smith v. *Texas*, 311 U.S. 128 (1940)	39
Spencer v. *Kemp*, 781 F.2d 1458 (11th Cir. 1986) (en banc)	18
Strickland v. *Washington*, 466 U.S. 668 (1984).	26, 37
Swain v. *Alabama*, 380 U.S. 202 (1965).	4, 27
Thompson v. *White*, 661 F.2d 103 (8th Cir. 1981), *vacated and remanded*, 456 U.S. 491 (1982), *adhered to on remand*, 680 F.2d 1173 (1982), *cert. denied*, 459 U.S. 1777 (1983)	25
United States v. *Cronic*, 466 U.S. 648 (1984)	37
United States v. *Jorn*, 400 U.S. 470 (1970)	38
United States v. *Oregon Medical Society*, 343 U.S. 326 (1952)	30
Vasquez v. *Hillery*, 474 U.S. 254 (1986).	17, 20
Wade v. *Mayo*, 334 U.S. 672 (1948)	29
Wainwright v. *Sykes*, 433 U.S. 72 (1977).	*passim*
Whitus v. *Georgia*, 385 U.S. 545 (1967)	5
Wooten v. *State*, 224 Ga. 106, 160 S.E.2d 403 (1968)	18
Worthan v. *Wyrick*, 805 F.2d 303 (8th Cir. 1986)	21
OTHER AUTHORITIES	
U.S. Const. amend. VI.	1, 2
U.S. Const. amend. VIII.	1, 2
U.S. Const. amend. XIV.	1, 2
18 U.S.C. § 243 (1982).	16, 24
28 U.S C. § 1254 (1982)	1
28 U.S.C. § 2254 (1982)	2
Fed. R. Civ. P. 52(a).	17, 29, 30, 33, 34
O.C.G.A. §§ 15-12-20, *et seq.* (1985)	23
O.C.G.A. §§ 15-12-40, *et seq.* (1985).	3, 23, 24
O.C.G.A. § 15-12-162 (1985).	6, 18
O.C.G.A. § 15-18-1 (1985)	4
O.C.G.A. § 15-18-6 (1985)	24

Table of Authorities Continued

	Page
Rules and Regulations for the Organization and Government of the State Bar of Georgia, Ethical Consideration 7-13	24
Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)	36

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit reversing the District Court's grant of habeas corpus relief is reported as *Amadeo* v. *Kemp*, 816 F.2d 1502 (11th Cir. 1987), and is reproduced in the Joint Appendix (J.A.) at 94. The previous decision of the Court of Appeals vacating the District Court's earlier grant of habeas corpus relief is reported as *Amadeo* v. *Kemp*, 773 F.2d 1141 (11th Cir. 1985), and is reproduced in the Joint Appendix at 82.

The two opinions of the District Court are not reported, but appear in the Joint Appendix at 71 and 90. The opinion of the Georgia Supreme Court on direct appeal, in which the Court declined to address the jury discrimination claim, is reported as *Amadeo* v. *State*, 243 Ga. 627, 255 S.E.2d 718 (1979), and appears in the Joint Appendix at 66.

JURISDICTION

The decision of the Court of Appeals was rendered on April 30, 1987. The Court of Appeals denied Mr. Amadeo's timely petition for rehearing on June 8, 1987. Mr. Amadeo's petition for a writ of certiorari was docketed in this Court on August 10, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

This case also involves 28 U.S.C. § 2254 (1982), which provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of treaties of the United States.

STATEMENT OF THE CASE

Tony B. Amadeo was "indicted, tried and sentenced [to death] by unconstitutionally composed juries" in Putnam County, Georgia in November, 1977. Order of the District Court, J.A. 78. The District Attorney's office which prosecuted him had instructed the jury commission to underrepresent black people and women on the master jury lists from which the grand and petit juries were drawn. However, this discrimination and the District Attorney's involvement in it were not known to Amadeo and his attorneys at the time of his trial.

Immediately upon learning of it—when the prosecution's handwritten directive to the jury commissioners was found by an attorney in another case in a mass of documents in the office of the clerk of court—Mr. Amadeo raised the issue in his brief on direct appeal to the Georgia Supreme Court. However, that Court refused to consider the issue because it had not been raised pretrial. *Amadeo* v. *State*, 243 Ga. 627, 629-30, 255 S.E.2d 718, 720 (1979), *cert. denied*, 444 U.S. 974 (1979).

The District Court below granted habeas corpus relief, finding that because of the prosecution's concealment of its actions, the claim was not reasonably available to Mr. Amadeo's defense counsel prior to trial, and, therefore, there was "cause" for the failure to raise the issue at that time. J.A. 92-93.

In a 2-1 decision, the Court of Appeals for the Eleventh Circuit rejected the finding of cause and found the claim procedurally barred under this Court's decisions in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and *Francis* v. *Henderson*, 425 U.S. 536 (1976). *Amadeo* v. *Kemp*, 816 F.2d 1502 (11th Cir. 1987), J.A. 103. The dissent argued that the majority's decision "rewards the state for its underhandedness and stretches the doctrine of *Wainwright* v. *Sykes* beyond recognition." 816 F.2d at 1508, J.A. 106 (Clark, J., dissenting). This Court granted certiorari on October 19, 1987.

A. The Discriminatory Scheme and its Concealment

Georgia law provides that a jury commission, composed of six members appointed by the judge of the Superior Court and the clerk of the court as secretary, is to select "upright and intelligent citizens" to serve as jurors. Off. Code of Ga. Ann. (O.C.G.A.) § 15-12-40 (1985). The jury commissioners compose two master jury lists, one from

which the grand jury is selected and another from which the venires for petit juries, called traverse juries in Georgia, are selected.

The grand jury which indicted Mr. Amadeo and the traverse jury which tried him and sentenced him to death were drawn from master jury lists composed by the Putnam County Jury Commission in accordance with a handwritten directive from the District Attorney.[1] The District Attorney's note instructed the commission on exactly how to underrepresent blacks and women on the master jury lists. J.A. 2-4.

The note directed the commissioners to limit the number of black persons on the grand jury list to 101 of the total of 322 persons on the list. The note indicated that the percentage of blacks in the eligible population was 42.1 and that the selection of 101 blacks would result in a percentage of 31.4 blacks on the list. J.A. 3. Thus, black people would be underrepresented by an absolute disparity of 10.7 percent. The note directed the commissioners to underrepresent blacks by 5.1 percent on the traverse jury list. J.A. 3.

The District Court found that these disparities were set to insulate the discrimination from challenge based upon an inference of discrimination raised by the size of the disparity under the decisions of this Court and the Court of Appeals for the Fifth Circuit. J.A. 78. *Compare Swain* v. *Alabama* 380 U.S. 202, 208 (1965) (purposeful discrimination cannot be inferred from ten percent disparity)

---

[1] The term "solicitor" appears frequently in the record because the title of the position changed from solicitor to district attorney on July 1, 1977, just a few months before Mr. Amadeo's trial. O.C.G.A. § 15-18-1 (1985). The term "district attorney" will be used throughout this brief.

with Whitus v. *Georgia*, 385 U.S. 545, 552 (1967) (16 percent disparity establishes prima facie case and shifts burden of proof to state); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972) (14.6 percent disparity establishes prima facie case); *Preston* v. *Mandeville*, 428 F.2d 1392 (5th Cir. 1970) (13.3 percent disparity constitutes prima facie case).

The jury commissioners complied with the directive. The District Court found that "the composition of the [jury] box was exactly in accordance with what the District Attorney's office had suggested. He said 'Do it this way,' and they did it." J.A. 91-92.

Following revision of the grand and petit jury list in accordance with the prosecutor's plan, Mr. Amadeo and two other persons were indicted on October 3, 1977, and charged with a homicide occurring in the course of an attempted robbery which happened on September 29, 1977. At the time, Mr. Amadeo was 18 years of age and serving in the United States Marine Corps. Two lawyers were appointed to represent him and his two codefendants.

Counsel for Mr. Amadeo filed a demurrer seeking to quash the indictment. In late October, counsel moved for a change of venue, asserting that "the public mind has been so poisoned and prejudiced by exaggerated rumors in the newspapers and local press that Movants will be unable to get a fair trial by an impartial jury" in Putnam County. J.A. 62. Counsel also moved for a continuance, arguing that "[t]he case should not be allowed to proceed to trial before the third week of March, 1978, on account of the passions and prejudice engendered against the Defendants by the public communications media" as well as the need for time to prepare the cases of three defendants from Minnesota, Maine and Texas. J.A. 64-65.

However, counsel's efforts to quash the indictment, change the venue, or postpone the trial until another term of court were unsuccessful. Just two months after the offense, trial commenced on November 28, and Mr. Amadeo was sentenced to death on November 30, 1977.

At no time prior to trial were Mr. Amadeo's lawyers aware of the District Attorney's directive, J.A. 24, 33. As a result counsel did not comply with Georgia law that requires that grand jury challenges must be made prior to indictment, and challenges to the traverse jury must be made before the commencement of voir dire. O.C.G.A. § 15-12-162 (1985).

B. Discovery of the Scheme

In August of 1978, ten months after Mr. Amadeo's trial, the prosecutor's directive to the jury commissioners came to light in a federal action, *Bailey* v. *Vining*, which challenged the at-large voting procedures in Putnam County. Christopher Coates, an attorney involved in that challenge, reviewed every master list for both the grand and traverse juries from the late 1940's through 1978. Mr. Coates was attempting to find evidence of a historical pattern of discrimination that would provide circumstantial evidence in the voting rights case. J.A. 42.

In the process of sorting through thirty years of jury lists, Mr. Coates came across a page from a legal pad upon which figures, initials and a few words were written in longhand. J.A. 2-4, 44. It was not captioned or otherwise designated, dated or signed. It did not bear the file stamp of the clerk's office. Mr. Coates asked the clerk of the court, in whose office he was working, if he was familiar with the note. J.A. 45. The clerk responded that "it had come from the District Attorney's Office and that it was instructions to the Jury Commissioners in Putnam

County about what to do concerning the Master Grand and Traverse Jury Lists." J.A. 45.

The District Attorney's instructions were introduced in evidence in the *Bailey* case on August 15-17, 1978, before the United States District Court for the Middle District of Georgia. R.W. Dennis, the clerk of the Putnam County Superior Court, testified as follows regarding them:

> Q. In reconstituting the jury list, Mr. Dennis, did the jury commissioners aim at the figures suggested by the writer of this memorandum?
>
> A. Yes, they did. I turned that list over to the chairman of the jury commission.
>
> Q. With regards to grand jury, the writer of that memorandum suggested 101 black persons be put on that grand jury list?
>
> A. Yes.
>
> Q. And that was supposed to bring the percentage up to 31.4 percent?
>
> A. Correct.
>
> Q. With regards to—
>
> THE COURT: Is this the way the present jury box is made up in your county?
>
> THE WITNESS: Yes sir.
>
> MR. COATES: Your honor—
>
> THE COURT: Y'all are wasting a lot of time over in that county trying anybody for a crime.
>
> MR. COATES: Your honor, that's the solicitor. We would suggest that the writer of that memo is telling the jury commissioners how to under-represent blacks but avoid a prima facie case under Fifth Circuit case law.

THE COURT: Yes sir, looks like it.

* * *

THE COURT: Well, there's no question in the Court's best judgment that the jury box as it now exists is unconstitutionally composed and cannot be further utilized for any purpose until it's completely reconstituted. . . .

Bailey v. *Vining*, Civil Action No. 76-199 MAC (M.D. Ga. 1978), Evidentiary Hearing at 118-119, J.A. 9-10; Order of August 17, 1978 at 7.[2] The Court ordered the jury commissioners, who were added as defendants in the action after the jury discrimination was discovered, to draw up new master lists. *Id.*

After the *Bailey* hearing, Mr. Coates related what he had discovered to E. R. Lambert, one of Mr. Amadeo's court-appointed attorneys, who was then working on Mr. Amadeo's appeal to the Georgia Supreme Court. J.A. 47. Mr. Lambert indicated that he had not known of any actions by the District Attorney to limit the number of blacks on the jury list. J.A. 52. Mr. Lambert told Mr. Coates that he wished he had known about it prior to trial "because we were looking for every issue to raise" on behalf of Mr. Amadeo. J.A. 47.

Mr. Lambert told Nelson Jernigan, an attorney with whom he worked in the Georgia legislature, that he would have raised the issue prior to trial if he had know about it and asked Mr. Jernigan's assistance in raising the issue before the Georgia Supreme Court. J.A. 59-60. Mr. Jernigan, who had served as a court administrator, thought that the District Attorney's action violated the requirement that only the Superior Court Judge be instructing and answering questions from the jury commissioners. J.A. 56. He testified in the District Court below:

> . . . [W]hen I saw that a person who was a lawyer who had an interest in cases that would be tried by the jurors had directly communicated . . . to the Jury Commissioners, I thought that that was an impropriety of some significance . . . . [T]here's intentional discrimination by instructing the Jury Commissioners from someone who has an interest, an advocate, who's going to appear before these jurors; in other words, he's stacking the jury.

J.A. 56.

[2] The transcript appears in the Record as Appendix B and the order as Appendix E to Petitioner's Brief in Support of Petition for a Habeas Corpus, District Court Docket No. 7.

C. Presentation of the Claim to the State Courts

The District Attorney's discriminatory scheme was raised in Mr. Amadeo's opening brief to the Georgia Supreme Court filed on December 18, 1978, and in a supplemental brief devoted exclusively to the issue. Petitioner's Exhibit 3, J.A. 12-18. The District Court's order in *Bailey* and the applicable portions of the transcript of the evidentiary hearing were appended to the supplemental brief.

In the supplemental brief, Mr. Amadeo's lawyers argued that there could not have been waiver of the jury discrimination claim because there was no opportunity to discover it:

> Here the lawyers, no matter how effective, could not have known of this insidious defect in the jury selection process until it was unearthed in the Federal proceedings. The lawyers raised the issue in the trial court by way of Notice of Appeal and Enumeration of Error, *at the earliest possible time after notice of the defect.*
>
> * * *

> Specifically, the reason that the defendant's lawyers could not have known of this defect was that an examination of the statistics on the representation of various cases would not have lead the lawyers to conclude that that a *prima facie* case on the percentage disparity could be made out. In fact this was the apparent purpose of the memo. Further, there was available to defense counsel no means to discover this unofficial directive or memo which was not a part of the public record.

J.A. 16-17 [emphasis original]. Nevertheless, the Georgia Supreme Court declined to consider the claim, holding that it "comes too late." *Amadeo* v. *State*, 243 Ga. at 629-30, 255 S.E.2d at 720, J.A. 68.

Mr. Amadeo again sought to present his claim to the state courts of Georgia in a petition for a writ of habeas corpus filed in the Superior Court of Putnam County. However, the Court refused to consider the claim:

> This issue was raised by defendant on his post conviction appeal to the Supreme Court of Georgia and this matter was decided adversely to defendant. *Amadeo* v. *The State*, 243 Ga. 627, 629.

Order of Superior Court of Putnam County, Feb. 29, 1980, at 1 (Respondent's Exhibit 3). The Georgia Supreme Court denied a certificate of probable cause to appeal from the Putnam County order. Respondent's Exhibit 4. Having exhausted state remedies, Mr. Amadeo sought relief in the District Court below.

D. Findings and Decision of the District Court

Mr. Amadeo's federal habeas corpus petition was heard by the same United States District Judge who had decided *Bailey*. As in state court, Mr. Amadeo asserted the facts as established in *Bailey* as a basis for relief and again filed copies of the District Attorney's directive to

the jury commissioners, the applicable portions of the *Bailey* transcript and the District Court's order in *Bailey* in support of his claim. D. Ct. Docket No. 7, Appendixes B, C and E. The District Court observed that under the facts developed in *Bailey*, "[c]learly, petitioner was indicted, tried and sentenced by unconstitutionally composed juries." J.A. 78. The Court noted that it had been determined in *Bailey* that the jury selection procedures in Putnam County "were intentionally designed to underrepresent black citizens in an unconstitutional manner" in that "the Putnam County Jury Commissioners intentionally selected a specific number of individually designated blacks so as to achieve underrepresentation of approximately 11 percent—not enough to make out a prima facie case but underrepresentation nonetheless." J.A. 77, 78.

The Court then considered the State's argument "that this claim has been waived under a valid state procedural rule and cannot be asserted here absent a showing of 'cause and prejudice' for the failure to assert this issue at trial. *Francis* v. *Henderson*, 425 U.S. 536, 542 . . . ." J.A. 79. Observing that "the cause and prejudice test is designed to preclude argument of issues deliberately withheld at trial and first asserted in federal court—a tactic known as "sandbagging'"—the Court found that Amadeo's lawyers could not have raised the issue prior to indictment and trial.

> It was not until after trial, and after this court's decision in *Bailey*, that the inculpatory facts of how the Putnam County juries were composed came to light. Petitioner immediately asserted the claim on direct appeal to the Georgia Supreme Court, years before a federal action was first filed.

J.A. 79. The Court concluded that these circumstances constituted cause:

> This court continues to be appalled by the manner in which the Putnam County jury commissioners upon suggestion of the prosecuting attorney recompiled the grand and petit jury lists to underrepresent blacks and females. To overlook this act of intentional underrepresentation . . . on the basis of a rule of procedure would indeed be a miscarriage of justice. Accordingly, this court finds that sufficient cause and prejudice exists to require this court . . . to grant the writ on the basis of an unconstitutionally composed grand and petit jury.

J.A. 80.

On appeal, the United States Court of Appeals for the Eleventh Circuit concluded that the prejudice prong of the cause and prejudice test was satisfied, *Amadeo* v. *Kemp*, 773 F.2d at 1145 n.6, J.A. 89 n.6, but remanded the case for further factual development regarding the "specifics of the alleged unconstitutional method of selecting the jurors" to determine "whether this method was so devious and hidden as to be non-discoverable" and whether the failure to challenge "was not a deliberate bypass." 773 F.2d at 1145, J.A. 88, 89.

On remand, the District Court conducted an evidentiary hearing, took testimony, and admitted as exhibits pertinent parts of the *Bailey* record as well as other documents. The District Court observed that there was no dispute as to the illegality of the District Attorney's action: "[W]e all agree that that was in reality intentional discrimination in the composition of the jury box which resulted in the box being unconstitutionally composed." J.A. 92. The State agreed. The Assistant Attorney General stated to the District Court: "The prejudice has pretty much been conceded by the State throughout the proceedings because of the intentional discrimination and uncontroverted evidence that was produced in *Bailey* v. *Vining* . . . ." Record Vol. 2 (Docket No. 17) at 67.

The Court found that the discriminatory scheme was concealed by the prosecutor's office. J.A. 91-92. As a result, Mr. Amadeo's lawyers did not know of it until after it came to light in *Bailey*. The Court found, in these circumstances, that it was reasonable for Mr. Amadeo's counsel not to have challenged the list. J.A. 92. The Court further found that if the lawyers had known of the District Attorney's memorandum to the jury commissioners, they would have challenged it. *Id.*

Relying on these factual findings, the District Court ruled that there was "more than adequate cause" to excuse the failure to challenge the grand jury list prior to indictment and the traverse jury list prior to trial. J.A. 93. The Court also found that there was not "a deliberate bypass in any sense" in the failure to bring the challenge before the discrimination was discovered. J.A. 93.

E. Decision of the Court of Appeals

A majority of the Court of Appeals disagreed with the finding of the District Court:

> The district court found "cause" to excuse the procedural default because the county's efforts to maintain yet conceal racial disparity on the jury lists prevented Amadeo's counsel from discovering the facts that could lead to a jury challenge. Once the memorandum was discovered by counsel in *Bailey* v. *Vining* and related to Amadeo's lawyers, they acted promptly to raise the jury issue on direct appeal. In the view of the district court, this "concealment" excused the procedural default.
>
> We disagree with that conclusion. The memorandum detailing the county's efforts to alter the racial composition of the master jury lists was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel

> elected to examine the jury lists, they would have found the memorandum. However, they made a considered tactical judgment not to mount a jury challenge because they wanted to preserve an advantageous jury venire.

816 F.2d at 1507, J.A. 103 [footnote omitted].

The dissent found that the majority's decision "ignores the policies underlying *Wainwright* v. *Sykes*, and ignores the factfinding of the district court." 816 F.2d at 1510, J.A. 109.

> At the time of trial, counsel [for Mr. Amadeo] had no reasonable basis for challenging the master jury lists. Since the [District Attorney's] memorandum was discovered after trial by a different attorney in an unrelated case, there is no indication that Amadeo was holding back his federal habeas "trump card" hoping for a favorable verdict. In fact, the district court specifically found that Amadeo's counsel *would* have raised the jury claim at trial if they had known about the solicitor's memorandum. Based on counsel's testimony at the evidentiary hearing, this factual finding is not clearly erroneous.

816 F.2d at 1510, J.A. 111.

The dissent also found "there is simply no factual support in the record" for the majority's finding that the District Attorney's directive was "readily discoverable" or that Mr. Amadeo's counsel "would have found the memorandum" if they had looked for it. 816 F.2d at 1512, J.A. 114. Instead, "[t]he fact that the jury issue did not surface at trial is largely attributable to the intentional concealment by the county." 816 F.2d at 1513, J.A. 116.

> In sum, comity concerns do not require that we reward the state for its own misconduct. In fact, the interests of justice mandate that we consider the merits of Amadeo's claim. Where the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review.

816 F.2d at 1513, J.A. 117-118.

SUMMARY OF ARGUMENT

Mr. Amadeo is entitled to federal review of his claim that the District Attorney and jury commission in Putnam County unlawfully discriminated on the basis of race and gender in the jury selection process which led to his conviction and death sentence. Mr. Amadeo was unable to challenge this discrimination before indictment and trial as required by Georgia law because the District Attorney concealed the factual basis of the claim for the very purpose of avoiding judicial review.

Because this failure to comply with the state's procedural requirements is attributable to the State and not Mr. Amadeo, there is "cause" for his failure to comply with the State's procedural requirements. The District Attorney's covert corruption of the jury selection process constitutes an "external factor" and "interference by officials" which made the claim "reasonably [un]available" and "impeded" defense counsel's ability to assert the claim. *Murray* v. *Carrier*, 477 U.S. ___, ___, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397, 408 (1986). Therefore, federal review of the claim is not barred by this Court's decision in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

There was no reasonable basis upon which Mr. Amadeo could challenge the jury selection process. *Reed* v. *Ross*, 468 U.S. 1, 17 (1984); *Engle* v. *Isaac*, 456 U.S. 107, 133 (1982). It was not known or even reasonably knowable, prior to Mr. Amadeo's trial, that the District Attorney, who had no official responsibility with regard to the jury

commission, had participated in a revision of the master jury lists by contriving a plan to perpetuate discrimination based upon gender and race. Mr. Amadeo and his counsel had no basis to suspect that the District Attorney was not abiding by his oath of office, the ethical standards which govern prosecutors, Georgia law, and federal law which prohibits exclusion of persons from juries on the basis of race. 18 U.S.C. § 243 (1982).

In addition, the District Attorney interfered with and impeded defense counsel's ability to make a challenge by engaging in deception. *Murray* v. *Carrier*, 106 S. Ct. at 2646, 91 L.Ed.2d at 408. The District Attorney designed his plan to avoid detection and insulate the discrimination from constitutional challenge. The jury lists were revised in such a way as to make it appear that discrimination had been eliminated while continuing to perpetuate it.

The District Court found that there was cause for the procedural default after making findings of fact that were based upon testimony and documentary evidence. The District Court found that the District Attorney's involvement in the jury selection was concealed and that Mr. Amadeo's lawyers would have challenged it if they had known of it. The Court of Appeals rejected these findings and substituted its own finding that the scheme was "readily discoverable" and that the lawyers did not discover it because they were not interested in mounting a jury challenge. *Amadeo* v. *Kemp*, 816 F.2d at 1507, J.A. 103.

The findings of the District Court are not clearly erroneous. Indeed, they are fully supported by the record. Therefore, the Court of Appeals erred in setting these findings aside. *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623

(1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-289 (1982); Federal Rule of Civil Procedure 52(a). Because the decision of the Court of Appeals rests on the substitution of its findings for those of the District Court on matters of historical fact, its decision must be reversed.

Barring Mr. Amadeo from vindication of important constitutional rights in these circumstances would serve no legitimate interest, but would reward the prosecution for its unlawful actions. It was the prosecution, not the defense, that withheld the factual basis of the claim in order to gain a tactical advantage. In doing so, the prosecution corrupted the jury selection process and prevented the "full airing" of the issue before trial as required by Georgia law. *Wainwright* v. *Sykes*, 433 U.S. at 88-90. Imposition of a procedural bar would not further "good-faith attempts to honor constitutional rights," *Engle* v. *Isaac*, 456 U.S. at 128, or protect the integrity of state procedures, *Reed* v. *Ross*, 468 U.S. at 10, but would run counter to all of the interests recognized in *Sykes*. Therefore, the decision of the Court of Appeals should be reversed.

ARGUMENT

PETITIONER AMADEO IS NOT BARRED FROM VINDICATION OF HIS CONSTITUTIONAL RIGHTS WHERE THE FACTUAL BASIS FOR HIS CLAIM WAS CONCEALED BY THE PROSECUTION FOR THE PURPOSE OF PREVENTING JUDICIAL REVIEW.

This case is yet another reminder that "114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life in the administration of justice." *Vasquez* v. *Hillery*, 474

U.S. 254, 264 (1986), *quoting Rose* v. *Mitchell*, 443 U.S. 545, 558 (1979).

Discrimination was clearly a factor in the process which led to the selection of Tony Amadeo's jury in 1977. The office which prosecuted Mr. Amadeo secretly directed the jury commission to underrepresent black people and women on the master jury lists. To avoid detection and a successful challenge, the prosecution instructed the commission to fix the percentage of blacks on the grand and petit jury lists and women on the petit jury list at just below the level that would establish a *prima facie* case of discrimination solely on the basis of statistical evidence.

The District Attorney succeeded in undermining the integrity of both the jury selection system and the adversary process. The jury commissioners followed this directive and Mr. Amadeo's lawyers, unaware of the District Attorney's actions, did not challenge the composition of the grand and petit juries before indictment and trial, as required by Georgia law.[3] The question presented here is whether, despite this deception, the State may invoke principles designed to protect its good faith reliance on its procedural rules to bar federal review of its discrimination.

---

[3] Georgia law requires that an objection to the grand jury composition be raised prior to indictment, *Sanders* v. *State*, 235 Ga. 425, 219 S.E.2d 768 (1975); *Wooten* v. *State*, 224 Ga. 106, 109, 160 S.E.2d 403, 406 (1968), and a challenge to the traverse jury before trial. *See Spencer* v. *Kemp*, 781 F.2d 1458, 1463-1464 (11th Cir. 1986) (en banc); O.C.G.A. § 15-12-162 (1985). The Georgia Supreme Court found that because Mr. Amadeo's counsel did not challenge the composition of the master jury lists before indictment and trial, the claim "[came] too late." *Amadeo* v. *State*, 243 Ga. 627, 629-30, 255 S.E.2d. 718, 720 (1979).

It is now well established that federal review of a claim may be barred if a state court rejected the claim for failure to comply with its procedural rules. *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976). When enforcement of a procedural rule by a state court serves a legitimate state interest, it may stand as an independent and adequate state ground for the decision which forecloses federal review. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 148 (1979); *Sykes*, 433 U.S. at 86-87; *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965).[4]

Recognition of valid procedural bars serves "the State's interest in the integrity of its rules and proceedings" which are designed to resolve issues involving "the constitutionality of the procedures leading up to the verdict," *Reed* v. *Ross*, 468 U.S. 1, 10 (1984), through a meaningful adversarial process in which the defendant is represented by effective counsel. *Murray* v. *Carrier*, 477 U.S. ___, ___, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 397, 413 (1986). Enforcement of procedural bars also requires that criminal defendants not withhold constitutional claims but comply with state procedures to ensure the "full airing of federal constitutional claims" by state trial courts. *Wainwright* v. *Sykes*, 433 U.S. at 88-90.

---

[4] If enforcement of the rule does not serve such a state interest, it does not bar vindication of important federal rights. *Henry* v. *Mississippi*, 397 U.S. 443, 447-448 (1965). *See, e.g., Reece* v. *Georgia*, 350 U.S. 85 (1955); *Rogers* v. *Alabama*, 192 U.S. 226 (1904); *Carter* v. *Texas*, 177 U.S. 442, 447 (1900). In each of these cases, this Court held that jury challenges should be considered on the merits despite a failure by the defendant in each case to comply with state procedural rules because enforcement of the rules did not serve a legitimate state interest or would violate due process.

Even where there has been a failure by a defendant to comply with the state's procedural rules, a federal court must reach the merits of a constitutional claim where a petitioner establishes cause and actual prejudice for the default. *Isaac*, 456 U.S. at 126-130; *Sykes*, 433 U.S. at 87-88. Here, prejudice has been conceded by the State, Record, Vol. 2 (Docket No. 17), at 67, and found by the Court of Appeals, *Amadeo* v. *Kemp*, 773 F.2d at 1145 n.6, J.A. 89 n.6, and, thus, is not at issue. *See Reed* v. *Ross*, 468 U.S. at 12.

Mr. Amadeo is entitled to vindication of his claim under the holdings of these cases and the equitable principles upon which they rest. The failure to raise and litigate the issue prior to trial was not attributable to his counsel, but to the District Attorney's deliberate concealment of his actions in order to prevent review in any court, state or federal. This breakdown of the adversary process is due to actions by the State, which should not benefit from its own misconduct.

Barring Mr. Amadeo from presenting his claim in federal court would serve no legitimate state interest. It would not protect the integrity of the state process, but would reward the District Attorney for undermining "the structural integrity of the criminal tribunal itself." *Vasquez* v. *Hillery*, 474 U.S. at 263-64. It would not discourage defendants from withholding claims—Mr. Amadeo sought to present his claim to the state courts immediately upon learning of it—but would reward the District Attorney for successfully withholding this claim from Mr. Amadeo and the courts.

In this brief, petitioner Amadeo will demonstrate that the District Court correctly found that there was cause which excuses the failure to present the claim more

promptly to the state courts, that the Court of Appeals erred in rejecting findings of fact by the District Court which were not clearly erroneous, and, finally, that none of the state and federal interests involved here would be served by rewarding the State for its concealment of its discrimination.

A. THE PROSECUTION'S DELIBERATE CONCEALMENT OF ITS DISCRIMINATION CONSTITUTED CAUSE FOR MR. AMADEO'S FAILURE TO CHALLENGE THE JURY PRIOR TO TRIAL.

While reluctant to articulate a "precise definition of the 'cause-and-prejudice' standard," *Wainwright* v. *Sykes*, 433 U.S. at 87, this Court has held in *Carrier* that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's effort to comply with the state's procedural rule." *Carrier*, 106 S.Ct. at 2646, 91 L.Ed.2d at 408.

In *Carrier*, this Court identified two showings which would constitute cause: where an external factor made the claim "reasonably [un]available" or impeded defense counsel's ability to assert the claim, and where "interference by officials . . . made compliance impracticable[.]" *Id. See also Reed* v. *Ross*, 468 U.S. at 14 ("[T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement [of cause] is met."); *Worthan* v. *Wyrick*, 805 F.2d 303, 306-07 (8th Cir. 1986).

Here, the District Court correctly found that the covert activities of the prosecutor's office rendered the jury discrimination claim reasonably unavailable and impaired counsel's ability to protect his client's right to be indicted,

tried and ultimately sentenced by juries unaffected by racial discrimination.

1. Until the Inadvertent Discovery of the Prosecutor's Memorandum, the Deliberate Discrimination in the Selection of the Jurors Could Not Have Been Challenged.

The District Court found that no challenge was made to the prosecutor's discrimination in the jury selection process because Mr. Amadeo and his attorneys did not know of the plan at the time of his trial. A determination of whether this lack of knowledge on the part of counsel constituted cause turns upon whether there was a "reasonable basis" upon which to challenge the jury selection process. *Reed* v. *Ross*, 468 U.S. at 17; *see also Engle* v. *Isaac*, 456 U.S. at 133. Here, there was none.

There was absolutely no reason for Mr. Amadeo or his counsel to suspect that his adversary, the District Attorney, would be engaged in a covert illegal scheme to exclude groups he viewed as undesirable from the master jury list. Indeed, the very notion that the District Attorney would undertake to communicate *ex parte* with the jury commissioners and the court clerk, and to dictate to them how jurors should be chosen—let alone that the instructions would be followed—would be inconceivable if it had not actually happened in this case. Moreover, the scheme was designed by the District Attorney to avoid detection and challenge.

Under the Georgia statutes that govern jury commissioners and the drawing of juries, and the standards that govern prosecutorial conduct, there was no reasonable basis for Mr. Amadeo to suspect such foul play. Under Georgia law, only the members of the jury commission,

who are vested with independence and autonomy,[5] are authorized to revise the jury lists and determine who meets the qualifications for jury service. O.C.G.A. §§ 15-12-40(a), 15-12-41 (1985). Practicing attorneys and county officers are expressly barred from service on jury commissions. O.C.G.A. §§ 15-12-20(a), 15-12-21. All proceedings are privileged and must be conducted in secret.[6] Contact with outside entities or individuals is envisioned in only two circumstances,[7] neither of which involves the District Attorney.

The commission is required to draw up the master lists by selecting from the list of registered voters "a fairly representative cross-section of the intelligent and upright citizens of the county." O.C.G.A. § 15-12-40(a)(1). If the list is not fairly representative, the commission, without external input, is to supplement the list by "personally acquainting themselves with other citizens in the county," including those of any "significantly identifiable group . . . which may not be fairly represented on the list." *Id.*

---

[5] *See, e.g.*, O.C.G.A. § 15-12-22 (1985); *Clark* v. *State*, 255 Ga. 370, 373-74, 338 S.E.2d 269, 273 (1986) (legitimacy of jury commissioners would be undercut by the appearance of partiality that would arise if deputy sheriffs were permitted to serve as commissioners); *Blevins* v. *State*, 220 Ga. 720, 141 S.E.2d 426 (1965).

[6] O.C.G.A. §§ 15-12-22, 15-12-23(a) (1985). Commissioners take an oath not to disclose commission matters or proceedings absent court order. O.C.G.A. § 15-12-22. Only the master jury lists are a matter of public record, and even then, only after the list has been properly certified. O.C.G.A. § 15-12-43.

[7] The county clerk of court is appointed by statute to the commission. O.C.G.A. § 15-12-23(a) (1985). Commissions are also authorized to interact with superior court judges. The chief judge appoints and removes members of the commission. O.C.G.A. § 15-12-20. The court also determines how frequently jury lists must be revised. O.C.G.A. § 15-12-40(a).

Based solely on that direct determination by the commissioners themselves, the commission is required to determine who is eligible and qualified for inclusion. O.C.G.A. § 15-12-40.

Based on its statutory structure and purpose, it is clear that a county jury commission is not to be dependent upon the District Attorney's office for advice, much less be guided by its specific direction. Given its character and functioning, a jury commission ought not have contact with the prosecutor's office even if that contact were conducted in good faith. Where, as here, far from good faith, the contact is premised on the unlawful and untenable purpose of perpetuating race and gender discrimination, contact between jury commissioners and the prosecutor's office is not foreseeable.

Such foreseeability is further diminished by the legal and ethical standards governing the prosecutorial function. The statute setting out the duties of the District Attorney, O.C.G.A. § 15-18-6 (1985), contains no provision for interaction with the jury commission. Even if it did, the District Attorney would not be authorized to give the sort of advice rendered here. The District Attorney's responsibility is to uphold the law.[8] Congress has made the exclusion of persons from a grand or petit jury on the basis of race a crime. 18 U.S.C. § 243 (1982). Here, the District Attorney told the commissioners not only how to commit a crime, but how to get away with it.

---

[8] "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice . . . ." Ethical Consideration 7-13, Rules and Regulations for the Organization and Government of the State Bar of Georgia; *Hall* v. *State*, 180 Ga. App. 881, 885, 305 S.E.2d 801, 805 (1986), *quoting*, *Burns* v. *State*, 172 Ga. App. 645, 324 S.E.2d 197 (1984) (incorporating E.C. 7-13 as legal standard gauging prosecutorial misconduct); *see also Berger* v. *United States*, 295 U.S. 78, 83 (1935).

Thus, counsel cannot be expected to have anticipated that the District Attorney was instructing jury commissioners to discriminate in the compilation of master jury lists. Absent any information to the contrary, it was not unreasonable for them to assume that the District Attorney was upholding the law, rather than subverting it.

Similar circumstances were held to constitute cause in *Thompson* v. *White*, 661 F.2d 103, 105 (8th Cir. 1981), *vacated and remanded*, 456 U.S. 491 (1982), *adhered to on remand*, 680 F.2d 1173 (1982), *cert. denied*, 459 U.S. 1177 (1983). There the defendant discovered after trial that the sheriff had personally selected potential jurors from among people he knew instead of following the random jury selection procedure required by statute. The court held that because Thompson "did not know or have reason to suspect that the statutory procedure was not being followed, he certainly had 'cause' not to object." 680 F.2d at 1174, quoting 661 F.2d at 105-106.

Because knowledge of the prosecutor's dealings with the commission and his plan to limit the participation of black people and women cannot be imputed to defense counsel, the factual basis for the claim was not reasonably available. *Murray* v. *Carrier*, 106 S.Ct. at 2646, 91 L.Ed.2d at 408; *Reed* v. *Ross*, 468 U.S. at 14-15. Accordingly, there is cause for the failure to raise the claim preindictment and pretrial as required by Georgia law.

2. The District Attorney's Scheme Constituted an External Factor and Interference by Governmental Officials Which Prevented Mr. Amadeo's Counsel From Complying With the State's Procedural Requirement.

Not only was there no reasonable basis for Mr. Amadeo's counsel to suspect that the District Attorney

was involved in jury discrimination, but the District Attorney contrived to discriminate in such a manner as to conceal the very existence of that discrimination. His plan, implemented by the jury commissioners, gave the appearance of remedying the evil of discrimination, while actually perpetuating it and insulating it from constitutional challenge by avoiding a *prima facie* case based upon statistical inferences. This deception "interfered with" defense counsel's ability to detect and litigate the claim, thereby making compliance with the state's procedural rule not only "impractical," but impossible. *Carrier*, 106 S.Ct. at 2646, 91 L.Ed.2d at 408.

The ability of Mr. Amadeo's counsel to litigate the discrimination claim turned on having accurate and reliable information concerning how the juries were drawn. "[C]ounsel has a duty to make reasonable investigations" with respect to legal and factual matters. *Strickland* v. *Washington*, 466 U.S. 668, 691 (1984). However, counsel cannot be expected to investigate issues where there is an objective basis to believe they will not bear fruit. *Id.* at 691. This would have been a particularly unrealistic expectation in this case where counsel, representing three youths from Maine, Texas and Minnesota charged with capital murder, had just two months to prepare for a capital murder trial.[9] Consequently, in the case at bar,

[9] Counsel, moved to continue the trial from November to March because of the need to prepare on a number of fronts. J.A. 63-65. According to counsel's joint affidavit of October 27, 1977, a month before trial, counsel had yet to interview the three defendants, contact members of their families in Maine, Minnesota and Texas, contact their superior military officers at Jacksonville, North Carolina, investigate mental health issues, investigate Mr. Amadeo's interrogation by military personnel in Ft. Gordon, Georgia, and obtain the prosecution's list of witnesses. *Id.*

any decision to pursue a jury composition claim turned on the information that was reasonably available to counsel.

In these circumstances, no competent attorney, without any basis for suspecting the District Attorney's involvement in jury selection, could be expected to spend the "great deal of time" that plaintiff's counsel in *Bailey* v. *Vining* spent over the course of a summer before finding the District Attorney's note to the jury commissioners. J.A. 42. Even if counsel had pursued a challenge, the scope of his inquiry would have been far narrower than that of counsel in *Bailey*, who reviewed documents covering jury practices over thirty years.

At the time of Mr. Amadeo's indictment and trial, the only information available to counsel was misleading and the product of a deliberate deception by the District Attorney. Racial discrimination did not appear to affect the drawing and selection of juries in Putnam County because, as established by the evidence, and found by the District Court, underrepresentation was maintained just at the point where it would not constitute a *prima facie* case under *Swain* v. *Alabama*, 380 U.S. 202 (1965).

In a rural county, such as Putnam, such underrepresentation served two purposes. The race and gender disparities and operative discrimination was not readily apparent to trial lawyers who saw jury venires brought into court from one term to the next. Hence, there would appear to be no reason for further investigation. But even if further investigation were undertaken, the jury list had been altered in such a way that the requisite *prima facie* showing could not be made.

The scheme, therefore, accomplished the precise goal for which it was intended: as a result of official action, Putnam County juries would continue to function in an

unrepresentative manner, yet the likelihood of the process being again subjected to judicial and constitutional scrutiny was all but eliminated. The incentives to investigate and litigate jury claims, as well as the inferential proof generally marking such claims, were absent.

Thus, the District Attorney's deception made compliance with the state's procedural rules impossible. Where the prosecution misleads the defense concerning the nature of potential claims, the state is estopped from asserting that such claims are waived by defense reliance on the misrepresentation and consequent failure to pursue the claims in a timely fashion. *Freeman* v. *Georgia*, 599 F.2d 65, 72 (5th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). Therefore, there is cause for the failure to litigate the issue before the evidence was discovered.

B. THE COURT OF APPEALS' DECISION THAT THERE WAS NO CAUSE RESTS UPON ITS ERRONEOUS REJECTION OF FINDINGS OF FACT BY THE DISTRICT COURT THAT ARE NOT CLEARLY ERRONEOUS.

The holding of the Court of Appeals that there is no cause for petitioner's procedural default rests upon the court's rejection of the factfindings of the District Court which are not clearly erroneous. The Court of Appeals rejected the District Court's findings that the discriminatory scheme was concealed and substituted its own finding that it was "readily discoverable." 816 F.2d at 1507, J.A. 103. The Court of Appeals also rejected the District Court's findings that Mr. Amadeo's lawyers would have raised the challenge had they known of the District Attorney's note, and, observing that there was a "direct conflict" in the testimony on the point, substituted its finding that the lawyers did not find the memorandum

because they were not interested in a jury challenge. 816 F.2d 1507, 1507 n.9, J.A. 103 n.9.

Having substituted these findings for those of the District Court on these two questions of historical fact, the Court of Appeals then concluded: "These facts, in our opinion, do not establish sufficient 'cause' to excuse Amadeo's procedural default." *Amadeo* v. *Kemp*, 816 F.2d at 1507, J.A. 103. Because the Court of Appeals failed to take into account Federal Rule of Civil Procedure 52(a), its decision must be reversed.

Rule 52(a) requires that findings of fact by a district court are not to be set aside on appeal unless clearly erroneous. *Anderson* v. *Bessemer City* 470 U.S. 564 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-289 (1982).[10]

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have determined the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court . . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

---

[10] The clearly erroneous standard applies to the Court of Appeals' review of the District Court's findings of fact in a habeas corpus action. *Wade* v. *Mayo*, 334 U.S. 672, 683-684 (1948); *Adams* v. *Wainwright*, 764 F.2d 1356, 1360 (11th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986).

Anderson v. *Bessemer City*, 470 U.S. at 573-574 [citations omitted]. The clearly-erroneous rule applies even when findings are based "on physical or documentary evidence or inferences from other facts." 470 U.S. at 574. Particular deference is given to factfindings based upon determinations of credibility of witnesses who appear before the court. 470 U.S. at 575. *See also United States* v. *Oregon Medical Society*, 343 U.S. 326, 339 (1952).

The Court of Appeals failed to abide by the strictures of Rule 52(a) in rejecting factfindings which were based upon the credibility of witnesses who appeared before the District Court as well as documentary evidence received by the Court. The Court of Appeals rejected findings which were fully supported by the record and substituted factfindings which have little or no support in the record.

The record is replete with evidence which supports the District Court's finding of concealment. The record from *Bailey* v. *Vining*, with which the District Court was thoroughly familiar from its role as factfinder in that case, the testimony of Mr. Coates regarding how he found the note in reviewing documents covering thirty years, and the testimony of Mr. Amadeo's lawyers that they were unaware of the plan, J.A. 24, 33, 42, support the District Court's findings. However, the most compelling evidence is the District Attorney's note itself. Petitioner's Exhibit 4, J.A. 4. This series of numbers, initials, and a few words —untitled, undated, unsigned, handwritten on legal paper, and not stamped by the clerk—clearly was not intended for public inspection. Indeed, concealment is the only reasonable inference to be drawn from the very nature of the scheme; it could hardly succeed if it were known or readily discoverable.

Nevertheless, the Court of Appeals found that the prosecutor's note "was not concealed." *Amadeo* v. *Kemp*,

816 F.2d at 1507, J.A. 103. However, as observed by the dissent, "there is simply no support in the record for the proposition that the memorandum was 'readily discoverable' or that Amadeo's counsel 'would have found the memorandum' if they had looked." *Amadeo* v. *Kemp*, 816 F.2d at 1512, J.A. 114. All of the evidence supported the District Court's finding that the discriminatory plan was concealed.

Having found that the scheme was not concealed, the Court of Appeals then found that Mr. Amadeo's lawyers did not find the District Attorney's directive because they did not want to "mount a jury challenge because they wanted to preserve [an] advantageous jury venire." 816 F.2d at 1507, J.A. 103.[11] In doing so, the Court rejected the District Court's finding that the lawyers would have challenged the discrimination if they had known of the District Attorney's scheme. The Court of Appeals acknowledged that it was reaching a different conclusion about the credibility of the witnesses who appeared before the District Court than the District Court:

> In their testimony before the district court after remand, Amadeo's attorneys stated that had they known of the memorandum and the racial disparity created by it, they would have launched an attack on the racial composition of the jury . . . . These statements made after the conviction and sentence are in direct conflict with their earlier testimony that they suspected racial disparity in the list but made a conscious election to forgo a challenge because of the favorable jury array.

Amadeo v. *Kemp*, 816 F.2d at 1507 n.9, J.A. 103 n.9.

---

[11] As used by the parties and the courts in this litigation, "venire" and "array" refer to the prospective jurors selected from the master jury list for the jury selection process in this particular case.

The Court of Appeals erred in substituting its judgment regarding the credibility of witnesses for that of the District Court.

> . . . [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson v. *Bessemer City*, 470 U.S. at 575. Here the testimony that Mr. Amadeo's attorney's responded to discovery of the scheme with shock at the District Attorney's actions and regret that they had not known of it prior to trial is entirely plausible. It is supported by their immediately raising the issue to the Georgia Supreme Court. It is further supported by their representations to that court. J.A. 12-18. Clearly, the view of the evidence taken by the District Court was "permissible" and, therefore, it "cannot be clearly erroneous." *Anderson* v. *Bessemer City*, 470 U.S. at 574.

The factual conclusion drawn by the Court of Appeals that the traverse jury venire was so favorable that counsel would have ignored manipulation of the master lists by the prosecutor is contradicted by other actions taken by counsel which belie any particular affinity for the particular venire selected for Mr. Amadeo's trial. Counsel sought a change of venue, asserting that "a large portion of the jurors have formed an opinion as to Movants' guilt or have become prejudiced or biased against them." Petitioner's Exhibit 1, J.A. 61. This motion was asserted at the start and the conclusion of jury selection. Trial transcript (Respondent's Exhibit 1) at 1, A-245. Counsel also moved to continue the case until the next term of court. In a sworn affidavit in support of the motion, counsel

expressed his belief "that the passage of time will allow passions, excitement and prejudice to subside and that the Defendants will have a better chance for a fair trial if the trial is continued . . .]." Petitioner's Exhibit 2, J.A. 65.

Moreover, counsel were not aware of any "favorable [traverse] jury array," *Amadeo* v. *Kemp*, 816 F.2d at 1507 n.9, J.A. 103 n.9, at the time the grand jury challenge had to be made, prior to indictment. Thus, there was no basis to forgo challenging the grand jury.

Finally, regardless of what consideration counsel may have given to undertaking a traverse jury challenge based on statistics in the two months before trial, they did not and could not have made a decision not to challenge the grand and traverse juries based upon direct evidence of discrimination resulting from tampering by the District Attorney. The record indicates without contradiction that counsel did not know before trial that the District Attorney had instructed the jury commissioners to limit the participation of persons he deemed undesirable in the jury pools. "A defendant cannot have waived more than what he knew existed." *Freeman* v. *Georgia*, 599 F.2d at 72.

The question, however, is not which view of the facts is more convincing, but whether the facts found by the District Court are "plausible in light of the evidence viewed in its entirety[.]" *Anderson* v. *Bessemer City*, 470 U.S. at 574. Here, there was ample support in the record for the District Court's conclusion that Mr. Amadeo's counsel would have raised the discrimination claim if the prosecutor's surreptitious activities had not been concealed.

Two additional factors make it clear that the Court of Appeals misapprehended or misapplied Rule 52(a). First,

"the District Court was not faulted for misunderstanding or applying an erronecus definition" of the law by the Court of Appeals. *Pullman-Standard* v. *Swint*, 456 U.S. at 287. Here it was clear that the District Court applied the correct legal standard in making its findings of fact. J.A. 79, 93. The Court of Appeals did not take issue with the District Court's understanding of the applicable law, but instead disputed only pure questions of fact: whether the discrimination was concealed and, if it was not, why it was not found. In *Pullman-Standard*, this Court reversed for failure to abide by the strictures of Rule 52(a) after it found that the decision of the court of appeals was based on a disagreement concerning the facts, not a conclusion that the district court had erroneously applied the law. 456 U.S. at 291-293. The same resolution is required here.

Second, the Court of Appeals did not acknowledge Rule 52(a) or discuss its application to the facts found by the District Court. In *Pullman-Standard*, this Court noted that the court of appeals' acknowledgment of Rule 52(a) came "late in the court's opinion" and not "in the course of disagreeing with the District Court's resolution of the factual issues . . . ." 456 U.S. at 290. Here there was no mention of Rule 52(a) at all and the Court of Appeals expressly stated that it disagreed with the facts found by the District Court. *Amadeo* v. *Kemp*, 816 F.2d at 1507, J.A. 103.

Thus, the Court of Appeals failed to apply the clearly-erroneous standard to the factfindings of the District Court. Its decision must be reversed because the facts as determined by the District Court clearly constitute cause under the decisions of this Court.

C. NO LEGITIMATE STATE OR FEDERAL INTEREST WOULD BE SERVED BY BARRING A CLAIM WHERE THE PROCEDURAL DEFAULT WAS THE RESULT OF DELIBERATE CONCEALMENT BY THE STATE FOR THE PURPOSE OF PREVENTING JUDICIAL REVIEW.

This Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." *Kuhlman* v. *Wilson*, 477 U.S. ___, ___, 106 S.Ct. 2616, 2623, 91 L.Ed.2d 364, 377 (1986), *quoting Fay* v. *Noia*, 372 U.S. 391, 438 (1963); *see also Murray* v. *Carrier*, 106 S.Ct. at 2650, 91 L.Ed.2d at 414. "Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Fay*, 372 U.S. at 438. The State in asserting a procedural bar against Mr. Amadeo comes before the Court not with clean hands, but in breach of a most fundamental "'constitutional duty—recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision of 1881 of *Neal* v. *Delaware* [103 U.S. 370 (1881)]—not to pursue a course of conduct . . . which would operate to discriminate against the selection of jurors on racial grounds'" *Peters* v. *Kiff*, 407 U.S. 493, 506 (1972) (opinion of Justice White), *quoting Hill* v. *Texas*, 316 U.S. 400, 404 (1942).

A holding that Mr. Amadeo is barred from federal review under the facts of this case would not serve any of the equitable principles which govern habeas corpus or the interests recognized by this Court in *Wainwright* v. *Sykes* and its progeny. Instead, it would allow the State to insulate its invidious discrimination from review by engaging in the most devious and underhanded tactics.

The "cause and prejudice" standard rests upon "consideration of comity and concerns for the orderly administra-

tion of justice . . . ." *Francis* v. *Henderson*, 425 U.S. at 538-539. Its adoption was based, in part, upon this Court's recognition that state criminal trial courts "hold initial responsibility for vindicating constitutional rights" and that federal intrusions into state trials may frustrate "good-faith attempts to honor constitutional rights" by those courts. *Isaac*, 456 U.S. at 128. *See Sykes*, 433 U.S. at 88-90. It strikes a balance between the federal interest in vindicating the constitutional rights of state prisoners, *Francis* v. *Henderson*, 425 U.S. at 541, and "the State's interest in the integrity of its rules and proceedings and the finality of its judgments." *Reed* v. *Ross*, 468 U.S. at 10. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*," 38 U. Chi. L. Rev. 142 (1970).

The cause and prejudice standard is intended to emphasize the "trial of a criminal case in state court as a decisive and portentous event" at which "all issues which bear on the charge should be determined . . . ." *Sykes*, 433 U.S. at 90. It requires defendants to make timely assertions of the safeguards available to them before the state courts so that issues can be fully developed and decided while the recollections of witnesses are the freshest. *Isaac*, 456 U.S. at 128, *Sykes*, 433 U.S. at 88. Requiring such compliance with the state's procedural rules "channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed* v. *Ross*, 468 U.S. at 10.

The cause and prejudice standard, therefore, depends on the proper functioning of the adversary system, which, in turn, relies upon two independent components. On the one hand, it requires discharge of the defense function. *See Carrier*, 106 S.Ct. at 2650, 91 L.Ed.2d at 413. Criminal proceedings are a "reliable adversarial testing process," only where an accused is represented by counsel whose performance satisfies professional standards commensurate with the sixth amendment. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984); *see also United States* v. *Cronic*, 466 U.S. 648, 656-657 (1984). If the adversary process is to work, defense functions must be carried out in a way that precludes "sandbagging," or the withholding of claims at trial so that they may be relied upon in subsequent proceedings. *Sykes*, 433 U.S. at 89.

The adversary process is also impaired by the perversion of its other component, the prosecutorial function. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Miller* v. *Pate*, 386 U.S. 1 (1967); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Such a perversion unquestionably occurs where the prosecutor jeopardizes the integrity of formal proceedings by misleading or deceptive conduct that is specifically intended to accomplish illegal ends. *Franks* v. *Delaware*, 438 U.S. 154 (1978) (fourth amendment violated where state relies upon material misstatements in warrant proceeding); *Oregon* v. *Kennedy*, 456 U.S. 667 (1982) (fifth amendment violated where prosecutor commits acts with the specific intent to violate double jeopardy rights); *Napue* v. *Illinois* (due process violated by prosecutor's failure to correct misleading trial testimony).

None of the interests served by the cause and prejudice standard, or ultimately the adversarial system, would be furthered by enforcement of a procedural bar against Mr. Amadeo. To be sure, the "sanctity" and "prominence" of his trial were undermined, *Isaac* 456 U.S. at 127, but not because Mr. Amadeo's counsel failed to make a timely challenge to the processes that led to the selection of grand and petit jurors. To be sure, his trial was also marred by sandbagging, but it was not the defendant who

sought to manipulate procedure to gain a tactical advantage.

In this case it is the prosecutor, not the defendant, who has undercut the integrity of judicial process and who is responsible for the failure to litigate paramount constitutional questions in accord with state procedural law. It is the prosecutor who jeopardized adversarial process when he distorted and withheld the factual basis for the claim and deliberately bypassed lawful procedure to gain an untenable end.

Here the prosecutor corrupted the trial process in a particularly pernicious way. The District Attorney was not merely a passive participant to a proceeding in which constitutional obligations were not honored. *Giglio*, 405 U.S. at 154 (failure to disclose exculpatory material unconstitutional even though prosecutor unaware of the existence of the impeachment material). Instead, he singularly spearheaded the commission of unconstitutional and criminal acts, and did so in a way that involved their deliberate concealment. *Compare Miller; Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) ("rudimentary demands of justice" violated where prosecutor not only relies on false testimony, but is aware it is false and deliberately attempts to conceal its falsity).

Reliance on a doctrine designed to bolster the significance of trials and promote adversarial process to bar federal review of the prosecutor's actions would be particularly inappropriate here because the prosecutor violated the most "valued right" of all. *United States* v. *Jorn*, 400 U.S. 470, 484 (1970). "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391

U.S. 145, 155 (1968). "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process." *Peters* v. *Kiff*, 407 U.S. at 502. Discrimination that affects juries, therefore, "strikes at the fundamental values of our judicial system and our society as a whole," *Rose* v. *Mitchell* 443 U.S. 545, 556 (1979), and is "at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U.S. 187, 195 (1946).

Because claims of racial discrimination in jury selection "brings the integrity of the judicial system into direct question" a "federal forum must be available if a full and fair hearing of such claims is to be had." *Rose* v. *Mitchell*, 443 U.S. at 562, 563. It is particularly important that a federal forum be available in this case where the District Attorney not only brought about this discrimination, but did it in a way that was designed to avoid detection and adversary testing.

The equitable character of habeas corpus relief requires that cause for apparent procedural defaults be recognized where, as here, an issue is not timely litigated due to government deception and covert interference with the exercise of constitutional rights. The "cause and prejudice" standard is intended to protect a state's *"good-faith* attempts to honor constitutional rights." *Isaac*, 456 U.S. at 128 [emphasis added]. As noted by the dissent below, it would be ironic indeed if a doctrine rooted in equity and comity were turned on its head and used to shield the deliberate subversion of pivotal constitutional principles.

Instead, as called for by the dissent, "[w]here the state's efforts to conceal its misconduct cause an issue to be ignored at trial, the state should not be allowed to rely on its procedural default rules to preclude federal habeas review." 816 F.2d at 1513.

Thus, the equitable principles which govern habeas corpus and which informed this Court's decision to adopt the cause and prejudice standard in *Sykes* all militate strongly against the State's assertion of procedural default. The fairness and integrity of process will best be served by the vindication of the important federal rights denied Mr. Amadeo. Accordingly, this Court should hold that there was cause for the failure to challenge the jury discrimination before trial.

CONCLUSION

For the foregoing reasons, Tony B. Amadeo respectfully prays that this Court reverse the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

STEPHEN B. BRIGHT
PALMER SINGLETON*
ROBERT L. MCGLASSON
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

WILLIAM M. WARNER
507 Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-5686

Counsel for Petitioner
**Counsel of Record*